Supreme Court, U.S.
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No. (1)

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In The

Supreme Court of the United States

October Term, 1995

ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY AND APPURTENANCES THERETO KNOWN AS 143-147 EAST 23RD STREET, NEW YORK, NEW YORK, LISTED AS BLOCK 879, LOT 27, WHICH INCLUDES THE KENMORE HOTEL and JUDE HOTEL CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

ALAN H. LICHTENBERG
Counsel of Record
URI SELLA
LICHTENBERG & GINACH, P.C.
Attorneys for Petitioners
90 Park Avenue
New York, New York 10016
(212) 867-7900

8826
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

78 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does civil forfeiture of a hotel under 21 U.S.C. § 881(a)(7) constitute an excessive punishment of its owner, within the meaning of the Eighth Amendment, if the owner did not commit any wrong, and the wrongdoing was committed entirely by others?

2. Can the owner of the hotel's failure to act in accordance with police recommendations be punishable by forfeiture of the hotel under 21 U.S.C. § 881(a)(7)?

3. Can an entire hotel building be forfeited under 21 U.S.C. § 881(a)(7) while wrongdoing was a result of drug activity performed in only a few of its rooms?

4. Can the consent of the owner of real property to illegal activities within its property be inferred from the owner's failure to successfully prevent such illegal activity?

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OPINION BELOW

On February 26, 1996, the United States Court of Appeals for the Second Circuit issued its opinion affirming the opinion of the District Court, and is reported at 77 F.3d 648 (2nd Cir. 1996) (Petitioner's Appendix A). The decision of the United States District Court for the Southern District of New York was issued on June 12 and 13, 1995, and is reported at 888 F. Supp. 580 (S.D.N.Y. 1995) (Petitioner's Appendix B and C).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals was issued on February 26, 1996.

This Court's jurisdiction in this case is pursuant to 28 U.S.C. § 1254(1). The Second Circuit's jurisdiction is pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

21 U.S.C. § 881(a)(7) provides, in pertinent part, as follows:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

> All real property, including any right, title, and interest (including any leasehold interest) in the whole or any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

A. Preliminary Statement

This petition raises the delicate balance between the government's right to confiscate real property in which crime was committed and the individual freedom for right of ownership of land in this country. It requires a determination of what is considered excessive punishment under the Eighth Amendment of the United States Constitution. Finally, it addresses the legitimacy of the civil forfeiture as it is employed by the government in its battle against illegal drugs.

More specifically, the issues raised in this Petition are the following:

- What constitutes consent of property owner to illegal activities within the property.

• Can property be subject to forfeiture if its owner did not commit any wrong.

• Can the government confiscate real property due to an owner's failure to comply with police request for cooperation.

• Can the government confiscate real property due to the government's ineffectiveness in eliminating the criminal activities within the property.

• Is an entire hotel building, including its commercial portions, subject to forfeiture due to the mere fact that a small number of its room was used for illegal drug activity.

B. Statement of the Facts

The Petitioner All Right, Title and Interest in Real Property and Appurtenances, thereto known as 143-147 East 23rd Street, New York, New York, Listed as Block 879, Lot 27, which includes the Kenmore Hotel (hereinafter referred to as the "Hotel") was occupied by the 22 story Kenmore Hotel, the largest commercial single-room-occupancy building in New York City, comprising more than 600 single-occupancy units, which were mainly occupied by poor or elderly tenants.

In 1985 the Hotel was acquired by Petitioner Jude Hotel Corporation ("Jude") for the sum of $7,900,000.

According to records of the New York City Police Department ("NYPD") and the Manhattan District Attorney's Office (hereinafter collectively the "Local Authorities"),[1] from early 1991 until June 1994, numerous narcotics activities took

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1. The facts were issued by the government in a statement of material facts pursuant to Civil Rule 3(g) of the Federal Rules of Civil Procedure.

place in and around the Hotel, resulting in several arrests and confiscation of drugs by the NYPD. According to those records, drug related activities were identified in twenty seven (27) of the Hotel's more than six hundred (600) rooms.

In February 1993, more than two years after the NYPD first identified drug related activities in the Hotel, and after several attempts by the NYPD to eliminate the criminal activity in the Hotel, the Local Authorities invited the majority shareholder of Jude, Dinh Truong Tran ("Tran") to attend a meeting with the Assistant District Attorney (the "ADA"). In this meeting, Tran's representative was informed by the ADA of the illegal activities in the Hotel. The ADA recommended that Jude would take several measures to help the Local Authorities in their battle against the continuous crime in the Hotel.

The measures recommended by the ADA to Jude included hiring full time uniformed security guards, screening prospective tenants, using a surveillance camera, providing photo identifications to tenants, and authorizing NYPD, in an affidavit, to patrol the floors of the Hotel and to arrest trespassers.

In a letter subsequently issued by the ADA to summarize the recommendations mentioned in the meeting, the ADA included a strict warning addressed to Jude, that if Jude would fail to cooperate with the Local Authorities and in accordance with the recommendations of the ADA, the Local Authorities would move to confiscate the Hotel pursuant to the Federal civil forfeiture laws.

Jude chose to act according to some of the recommendations of the ADA and not to act according to others.[2]

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2. Thus, for example, Jude hired uniformed security guards but (Cont'd)

In June 1994, shortly after the publication in the *New York Times* and the *New York Post* of articles describing the extensive criminal activity in the Hotel, and in light of NYPD's failure to eliminate the drug problem in the Hotel for the last four years, the government moved to confiscate the property.

Except for the forfeiture of the Hotel, Petitioner, its officers, agents or employees, were never prosecuted, accused, or otherwise sanctioned by the local authorities or the federal government for any violation of narcotics laws, and were never accused, prosecuted or otherwise sanctioned on violations of any other laws or regulations, including any rules or regulations regarding maintenance or security of hotels or buildings. Nor was it ever argued or demonstrated that Petitioners benefited from the illegal activity in the Hotel.

C. Summary of the Opinion of the District Court

In supporting Respondent's right to forfeit the Hotel, the District Court concluded that:

- the government established that drug violations occurred in the Hotel and Petitioner's "token efforts to correct the problems that its own mismanagement and neglect helped to create, fall far short of the diligence required to establish lack of consent" pursuant to 21 U.S.C. § 881(a)(7) (Petitioner's Appendix B).

- under the proportionality test adopted by the Court, the

(Cont'd)
dismissed them due to high costs, and hired, instead, tenants of the Hotel as guards (according to Respondent, the guards hired by Jude were poorly paid and in effect facilitated the narcotics activities in the Hotel); Jude signed the affidavit proposed by the ADA after including certain amendments therein; Jude installed a buzzer at the front door which was broken within a week by drug offenders and was not replaced.

forfeiture was not excessive because the fine imposed on Jude was reasonable in comparison to fines imposed pursuant to criminal drug offenses against owner of property.

• "the relationship between the Kenmore Hotel and the drug trafficking that occurred there is sufficiently strong to sustain the proposed forfeiture against an Excessive Fines Clause Challenge."

D. Summary of the Opinion of the Court of Appeals

In supporting Respondent's right to confiscate the Hotel, the Court of Appeals stated that Petitioners failed to demonstrate their lack of consent to the drug activities in the Hotel because Petitioners failed to do all that was reasonably expected from an owner to do once it learned of the illegal activities in the property, and because unless an owner with knowledge of the activities could demonstrate that every reasonable activity was taken to curtail the drug related activity, consent was inferred and the property was subject to forfeiture. The court further concluded that under the test adopted by the Second Circuit in *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995), the forfeiture was not an excessive punishment.

REASONS FOR GRANTING THE WRIT

I.

THE OWNER DID NOT CONSENT TO THE ILLEGAL ACTIVITIES IN THE HOTEL.

A. Civil Forfeiture — General Considerations

In enacting 21 U.S.C. § 881(a)(7) Congress intended to balance between the two conflicting interests of (1) making drug

trafficking prohibitively expensive for the property owner, and (2) preserving the property rights of an innocent owner. *United State v. 141st Street Corp. by Hersh,* 911 F.2d 870 (2nd Cir. 1990). In interpreting the provisions of 21 U.S.C. § 881(a)(7), the Court should consider those conflicting interests. It is well settled law that the taking of property by the government is a serious action, subject to stringent constitutional scrutiny. *Payton v. New York,* 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980); *United States v. All Right, Title and Interest in Property and Premises Known as 710 Main Street, Peekskill,* 753 F. Supp. 121 (S.D.N.Y. 1990); *United States v. Premises and Property at 4492 South Livonia Road, Livonia, New York,* 889 F.2d 1258 (2nd Cir. 1989), *rehearing denied,* 897 F.2d 659 (2nd Cir. 1990); *United States v. Riverbend Forms, Inc.,* 847 F.2d 553 (9th Cir. 1988).

Similarly, in *United States v. Good Real Property,* 510 U.S. __, 126 L. Ed. 491, 114 S. Ct. 492 (a case involving applicability of due process in forfeiture actions) Justice Thomas in a separate opinion, stated as follows:

> Two fundamental considerations seem to motivate the Court's due process ruling: first, a desire to protect the rights incidental to ownership of real property, especially residences, and second, a more implicitly expressed distrust of the Government's aggressive use of broad civil forfeiture statutes.

B. Lack of Consent as Defense.

Consent is defined as the "compliance or approval esp[ecially] of what is done and proposed by another." Webster's Third New International Dictionary 482 (1971).

In order to successfully allege the defense of lack of consent, it was held that the owner must show that he did what reasonably might be expected from the owner in order to prevent the illegal activity. *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990).

The standard of reasonableness of the owner was narrowly construed by the court in order to prevent unjust forfeiture. Thus, in *United States v. All Right, Title and Interest in Property and Premises Known as 710 Main Street, Peekskill*, 744 F. Supp. 510 (S.D.N.Y. 1990), the court stated that the owner was required to show that he at least did something affirmative to stop the proscribed use of his property. The fact that the owner was unsuccessful in resolving the drug problem should not be interpreted as the owner's implied consent to the activity. *United States v. All Right, Title and Interest in Property and Premises Known as 710 Main Street, Peekskill*, 753 F. Supp. 121 (S.D.N.Y. 1990).

In fact, in most situations of forfeiture brought before the courts, the police was unaware of the existence of illegal activities in the property, and therefore the reasonable act expected from the owner was to inform the police of such activities. *United States v. Two Parcels of Property at Castle Street*, 31 F.3d 35 (2nd Cir. 1994) (parents failed to inform the police of illegal activities by their children). *See also, United States v. Chen*, 913 F.2d 183.

In this petition, the police were fully aware of, and practically helpless against, the criminal conduct in the premises and in fact informed the owner of such activity. There is no dispute that Jude took several measures in an attempt to cease the illegal activities in the Hotel, and Jude's position is that such measures constituted reasonable acts on its behalf.[3]

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3. Both the District Court and the Court of Appeals concluded however, (Cont'd)

C. Ineffectiveness of the Police

When the owner's attempts to stop the illegal actions in the property where executed simultaneously with the law enforcement's ineffective activities to prevent such activities, the owner should not be subject to forfeiture. *United States v. Certain Real Property and Premises Known as 171-02 Liberty Avenue, Queens, New York*, 710 F. Supp. 46 (E.D.N.Y. 1989) (it was unreasonable for the police to require the owner to do what the police was unable to do by its own efforts). *See also*, 753 F. Supp. 121 (S.D.N.Y. 1990), *supra* ("[t]he fact that he was unsuccessful in resolving the drug problem (as were the well-trained police who patrolled the area) should not be interpreted as his consent to that activity").

In this petition there is no dispute that the NYPD, for a period of four years and until it confiscated the property, was unable to eliminate the illegal activities in the Hotel even though it patrolled the premises, arrested several offenders, and confiscated illegal narcotics.

(Cont'd)
that since Jude did not comply with the ADA's recommendations, and since the criminal conduct in the Hotel continued, Jude did not act reasonably to prevent the crimes.

II.

THE GOVERNMENT COULD NOT FORFEIT THE HOTEL AS PUNISHMENT TO THE OWNER FOR FAILURE TO COOPERATE WITH THE LOCAL AUTHORITIES.

A. The Owner Was Not Obligated to Cooperate with the Local Authorities.

There is no dispute that Jude was not obligated to act pursuant to the recommendations suggested by the ADA during the meeting held in February, 1993. Furthermore, the government does not contend that Petitioners violated any criminal laws or regulations related to supervision, maintenance or safety of the premises nor that it acted negligently in connection thereof[4]. Nor is there any allegation the Jude violated any criminal law.

Consequently, the government had no authority to threaten Petitioner that if it would fail to act in accordance with the government's "recommendations" the government would confiscate the Hotel.

In *United States v. Premises Known as 171-02 Liberty Avenue, Queens, New York*, 710 F. Supp. 46 (E.D.N.Y. 1989) the owner of real property in which several drug related offenses have been committed was asked by the local police to cooperate with the police in its effort to fight against the offenders on his property. The owner agreed to cooperate with the police on some issues but refused to cooperate on others (including his refusal to

4. In *Austin v. United States*, 509 U.S. __, 125 L. Ed. 2d 448, 113 S. Ct. 2081 (1993) Justice Kennedy with whom the Chief Justice and Justice Thomas concurred, the court held that "[a]t some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question".

sign an affidavit permitting the police to arrest people on the premises). In response to the owner's refusal to cooperate with the police, the police informed the owner that if he would not be "part of the solution [he would be] part of the problem". After the owner refused to cooperate, the police moved to confiscate the premises.

In denying the forfeiture, the court held that the owner was not under any obligation to cooperate with the police in order to avoid forfeiture. In addition, the court held that it was unreasonable on behalf of the police to request from the owner to eliminate crime in his property while the well-trained police failed to achieve that same goal. The court stated that it was clear that the police determined that only forfeiture would put an end to the crime on the premises. In fact, the court concluded, the police determined to confiscate the property, and the owner could not have saved his property from the police decision. The court condemned the government's action and stated that "[t]he government has proven only that it took Greco's property, without just compensation, for the public purpose of fighting the war on drugs".

Indeed, the circumstances in the *Liberty Avenue* case are almost identical to those before this Court. In both cases, the police was continuously unsuccessful in its efforts to eliminate illegal activity in the property. In both cases the police requested cooperation from the owners, while there was absolutely no obligation on the owner to agree to such cooperation. In both cases, the police threatened the owners that their failure to cooperate with the police would result in forfeiture of their property. Finally, in both cases it was clear that the police moved to forfeit the property after it concluded that only this measure would best achieve their goal to eliminate the criminal activity in the property. There is no coincidence that the Local Authorities, after four years of unsuccessful attempts to "clean" the Hotel, moved in great haste to confiscate, immediately after

the *New York Times* and the *New York Post* published reports on the criminal activity in the Hotel.

III.

THE FORFEITURE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT.

The Excessive Fines Clause limits the government's power to impose excessive payments whether in cash or in kind.

In *United States v. Milbrand*, 58 F.3d 841 (2nd Cir. 1995), the Second Circuit established the following factors to be considered in determining excessiveness of a fine:

> (1) the harshness of the forfeiture (*e.g.* the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offence, and (b) the sentence that could be imposed on the perpetrator of such an offence; (2) the relationship between the property and the offence, including whether use of the property in the offence was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporary or spatially extensive; and (3) the role and degree of culpability of the owner of the property.

A. The Lower Court's Application of these Factors to this Action Constituted Excessive Punishment Under the Eighth Amendment.

In adopting the factors established in *Milbrand* the Court of

Appeals disregarded serious questions and doubts casted by the Supreme Court of the United States. Thus, *Milbrand* referred to the value of the property as an issue to be considered. However, Justice Scalia specifically stated in his opinion in *Austin v. United States*, 125 L. Ed. 2d 448, 113 S. Ct. 2081 (1993) that "[t]he question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense". Furthermore, In providing that there was a "substantial relationship" between the Hotel and the offenses, because the Hotel provided "seclusion and privacy" to the offenders, the Court of Appeals disregarded the doubts raised by the Supreme Court as to the traditional "guilt" attributed to the property, when such property constitutes merely the place in which the offense took place. Thus, in *United States v. Good Real Property*, 510 U.S. __, 126 L. Ed. 2d 491, 114 S. Ct. 492, Justice Thomas stated that "[u]nder this provision [21 U.S.C. § 811(a)(7)], 'large tracts of land [and any improvements thereon] which have no connection with crime other than being the location where a drug transaction occurred', . . . are subject to forfeiture. It is difficult to see how such real property is necessarily in any sense 'guilty' of an offense . . ."

It is clear that the Kenmore Hotel could not be considered as that traditional "instrument" with which the offense occurred (such as are, for example, the scales used for measurement of unlawful drugs, the farm used to cultivate marijuana, and the illegal distillery used to distil liquor).

Moreover, in forfeiting a Hotel of more than 600 rooms while the actual criminal activity was limited to no more than 30 rooms, the Court of Appeals disregarded another question related to the instrumentality of the property which is forfeited. As illustrated by Justice Scalia in *Austin*, by way of analogy to common-law: "if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a

deodand, since only the wheel could be regarded as the cause of death."

Finally, the Court of Appeals failed to adequately examine the connection between the owner of the Hotel and the criminal activities conducted in the Hotel. In fact, nowhere in the court's decision is there any showing that the owner committed any wrong, either intentional or negligent.[5] The only fault attributed to the owner by the Court of Appeals is that it failed to comply with the local authorities' recommendations (however, those constituted nothing but recommendations and imposed no legal duty); and that the owner was unsuccessful in eliminating the criminal activities from the Hotel (even though, there is no dispute that the well trained NYPD was unsuccessful as well).

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5. Although it is not specifically required under 21 U.S.C. § 881(a)(7) that the owner of the property will commit criminal offence in order to forfeit its property, it is nevertheless the most common consideration applied by the courts in determining the right of the government to forfeit property. *See, e.g., Alexander v. United States*, ___ U.S. __, 113 S. Ct. 2766 (1993); *Austin v. United States*, 509 U.S. __, 125 L. Ed. 2d 448, 113 S. Ct. 2081 (1993); *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994); *United States v. Premises Known as RR#1*, 14 F.3d 864 (3d Cir. 1994); *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992); *United States v. One Parcel Located at 9638 Chicago Heights*, 831 F. Supp. 736 (E.D. Mo. 1993).

CONCLUSION

WHEREFORE, for all of the foregoing reasons and in the interest of justice it is respectfully prayed that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ALAN H. LICHTENBERG
Counsel of Record
URI SELLA
LICHTENBERG & GINACH, P.C.
Attorneys for Petitioner
90 Park Avenue
New York, New York 10016
(212) 867-7900

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED FEBRUARY 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 934 August Term, 1995

(Argued: January 8, 1996 Decided Feb. 26, 1996)

Docket No. 95-6157

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

MILLAR ELEVATOR SERVICE COMPANY,

Plaintiff,

- v. -

ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY AND APPURTENANCES, thereto known as 143-147 East 23rd Street, New York, New York, Listed as Block 879, Lot 27, which includes the Kenmore Hotel,

Defendants,

JUDE HOTEL CORPORATION,

Claimant-Appellant.

Appendix A

Before: VAN GRAAFEILAND, KEARSE, and MINER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* ordering the forfeiture of the defendant property, including the Kenmore Hotel, to the United States because of narcotics activity, 21 U.S.C. § 881(a)(7), over claimant's Eighth Amendment objection. *See* 888 F. Supp. 580 (1995).

Affirmed.

ELLEN SILVERMAN ZIMILES, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Southern District of New York, Kenneth M. Karas, Steven M. Haber, Assistant United States Attorneys, New York, New York, on the brief), *for Plaintiff-Appellee.*

DORIS G. TRAUB, New York, New York (Traub & Traub, New York, New York, on the brief), *for Claimant-Appellant.*

KEARSE, *Circuit Judge:*

Claimant Jude Hotel Corporation ("Jude") appeals from a final judgment of the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* ordering the forfeiture of certain of Jude's real property, which includes the Kenmore Hotel (the "Kenmore" or the "Hotel"), to the United States pursuant to 21 U.S.C. § 881(a)(7) (1994) on the ground that the Hotel was used to facilitate narcotics activity with the knowledge of Jude and without meaningful efforts by Jude to

prevent that activity. After the parties informed the court that there would be no need for a trial and that the only issue would be whether or not the forfeiture violated the Excessive Fines Clause of the Eighth Amendment to the Constitution, the district court granted summary judgment to the government, finding no violation of that Clause. On appeal, Jude contends (1) that summary judgment was inappropriate because there existed genuine issues of fact to be tried, and (2) that the court erroneously found that there was no Eighth Amendment violation. We conclude that the first contention has been waived and that neither has any merit.

I. BACKGROUND

Following several years of investigations by federal and local law enforcement officials into narcotics trafficking at the Kenmore Hotel in Manhattan, and after several attempts by local law enforcement officials to have Jude take steps to impede use of the Hotel for narcotics activity, the government commenced the present action in June 1994 seeking civil forfeiture of the Hotel. Following a period of discovery, the government moved for summary judgment. The motion was preceded by a conference with the district judge and a letter to the judge, from the government and Jude jointly, stating that there would be no need for a trial because the only issue was whether the requested forfeiture would violate the Eighth Amendment's Excessive Fines Clause:

> As the parties explained to Your Honor this past Monday, the parties believe that the case can be resolved on papers and need not involve a trial. To avoid a trial, the parties were going to agree on undisputed facts and

> brief the alleged excessiveness of the forfeiture of the Kenmore.

(Government's letter to the district court dated April 20, 1995, at 1, co-signed by Jude's attorney with the notation "Agreed to By: Barry M. Fallick, Esq. Counsel for Jude Hotel Corp." ("Joint Government Jude Letter").) The letter went on to state that, although the parties would not provide the court with a stipulation, Jude would not dispute the government's statement of the facts. It stated that, following one additional deposition,

> the Government will move for summary judgment on the forfeiture of the building and submit in support of its motion a statement of undisputed facts, pursuant to Local Rule 3(g). The Government will also brief the issue of the purported excessiveness of the civil forfeiture of the defendant premises.
>
> *Claimant Jude Hotel Corporation will brief the excessiveness issue, but will not submit its own set of undisputed facts. In short, there will be no need for a trial.*

(Joint Government-Jude Letter at 1-2 (emphasis added).)

A. *The Undisputed Facts*

On April 29, 1995, the government moved for summary judgment, supported by, *inter alia*, affidavits of law enforcement agents and deposition testimony from several individuals involved in the operation of the Hotel. The latter group included Truong Dinh Tran ("Truong") who was Jude's president and

majority shareholder; Cham Nguyen ("Cham"), Truong's longtime girlfriend who managed the Kenmore Hotel and lived with their children on the second floor of the Hotel, and was a shareholder in Jude; and Leon Aptekar, who had been employed at the Hotel for some 25 years prior to 1994 and who, as the night auditor, had responsibility for billing, record-keeping, and petty cash disbursements. The motion was supported by a 54-paragraph statement pursuant to Rule 3(g) of the Civil Rules for the United States District Courts for the Eastern and Southern Districts of New York ("Rule 3(g)") of the material facts as to which the government contended there was no genuine dispute ("Rule 3(g) Statement"). The Rule 3(g) Statement, thoroughly annotated with citations to the affidavits and the depositions, set out undisputed facts, including those recounted below, with regard to, *inter alia*, Jude's ownership of the Kenmore, the current value of Jude's equity interest in the property, the narcotics activity at the Hotel in 1991-1994, and Jude's knowledge of and responses to that activity.

1. *Narcotics Activity at the Kenmore Hotel*

The 22-story Kenmore Hotel is the largest commercial single-room-occupancy ("SRO") building in New York City, comprising more than 600 single-occupancy units. Many of its residents are elderly, infirm, and/or on public assistance. Jude, which was incorporated to purchase the Hotel and was owned principally by Truong, bought the Hotel in 1985, not expecting it to make a profit but anticipating that it would be a tax shelter for other companies owned by Truong. "TRUONG had no intention of spending any substantial money on improvements at the Kenmore for at least the first ten years" after Jude purchased the property. (Rule 3(g) Statement ¶ 26 .)

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Prior to its purchase by Jude, there had been "few if any problems with narcotics trafficking at the Kenmore." (Rule 3(g) Statement ¶ 25.) After Jude bought the Hotel, Truong reduced the staff and insisted that as many rooms as possible be rented, without regard to the identities of the individuals. The staff thereafter rented rooms to all comers, without obtaining identification or conducting any inquiry into their backgrounds.

Beginning at least as early as 1991, the Kenmore was a beehive of narcotics-related activities, including the sale, distribution, preparation, packaging and/or possession of narcotics. According to the records of the New York City Police Department ("NYPD") and the Manhattan District Attorney's Office (collectively the "local authorities"), from January 1, 1991 through June 6, 1994, there were 189 narcotics arrests and/or incidents of reported narcotics-related activity at the Hotel. NYPD officers patrolling the halls and responding to police calls during that period made numerous seizures of crack cocaine and narcotics paraphernalia, including crack vials, plastic baggies used to bundle vials in packages of 50, and implements for "cooking" cocaine into crack. During that 3 1/2-year period, more than 100 individuals were arrested and/or involved in the drug activity; some 70 of them were convicted.

2. *Jude's Knowledge of and Response to the Narcotics Activity*

After learning of narcotics activity in and around the Hotel, Aptekar, the night auditor, notified Cham, the Hotel's manager and part-owner. When Aptekar learned that some of the "security guards" were taking bribes from individuals seeking entry into the building, he informed Cham of that fact as well.

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In November 1992, Assistant District Attorney ("ADA" Ann B. Rudman, Director of the Manhattan District Attorney's Office Assest Forfeiture Unit, wrote to Truong about the substantial drug activity at the Hotel. The letter requested a meeting with Truong at the earliest possible time. No such meeting was held until four months later, on February 22, 1993. Truong did not attend but sent his representative, La D. Tran ("Tran").

> At this meeting, Tran was advised there had been at least sixty-five drug arrests during the previous two years, thirty-three arrests for other types of crimes stemming from drug activity, and at least three drug related homicides at the building. . . . Tran was told the likely cause of the crime problem in the building was that the building itself was being used to facilitate drug trafficking. . . . Tran claimed the family had owned the Kenmore Hotel since 1985, that the hotel had not been profitable, *that they were aware of the drug problem* and had a security booth to check people and they try to evict persons involved with drugs. . . .

(Rule 3(g) Statement ¶ 29 (emphasis added).) At that meeting, Rudman

> advised Tran to take reasonable steps to try to stop the drug activity, such as: 1) hire full-time uniformed security guards, in that the then current security people at the hotel . . . charge people money to come in and

> purchase drugs, 2) screen prospective tenants, 3) use a surveillance camera, 4) provide a photo identification card for tenants and 5) consider hiring a temporary management team to take over the hotel and clean up the hotel.

(Rule 3(g) Statement ¶ 30.) Rudman followed up this meeting with a letter dated February 25, 1993,

> memorializ[ing] to Tran the recommendations made during the meeting of February 22, 1993, to combat drug activity at the Kenmore Hotel, which included the following:
>
> > Carefully screen every applicant for an apartment;
> >
> > Keep every building entrance including the front door locked and install a buzzer system in the front door;
> >
> > Permit only identified tenants, verified guests of tenants, or others who demonstrate a legitimate reason for being present to enter the premises;
> >
> > Require each guest to sign in at the lobby front desk and record the name of the tenant whom he/she is visiting;

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Require each tenant to display some type of identification (preferably photographic identification) to gain entry into the premises;

Hire twenty-four hour, seven day a week private uniform [*sic*] security guards from an accredited security firm. (Ms. Rudman stated in her letter that the present security guards are either selling drugs or permitting individuals for a sum of money to enter the lobby and buy drugs.)

Be sure management oversees the premises and closely supervises the uniform [*sic*] guards;

Install and operate 24 hours a day a surveillance camera in the lobby;

Post and prominently display house rules which include the prohibition of all illegal controlled substances on the premises and a warning that violators will immediately be evicted. Post notice that there is a surveillance camera in the lobby.

Tightly secure every vacant apartment to prevent intrusion by trespassers. Regularly check that these apartments remain secure;

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> Keep all public halls, stairwells, and public rooms well lit and clean;
>
> Once a tenant has relinquished his/her room, make sure the key to the room has been returned to management.

This letter informed Tran that officials would seek assistance from the Federal Government in bringing an action pursuant tot he federal forfeiture laws in the event that his cooperation was not forthcoming.

(Rule 3(g) Statement ¶ 32.) Rudman sent Tran another letter dated March 8, 1993, again urging Jude to consider implementing the steps recommended at the meeting and in her letter February 25.

At the February 22, 1993 meeting, Rudman asked Tran to provide the local authorities with a list of all Hotel tenants and to sign a form affidavit authorizing NYPD to patrol all floors of the Hotel and arrest trespassers. Tran did not sign the affidavit but took it with him. He eventually returned an affidavit "in which he had made substantial changes," and he never sent the requested list of all tenants. (Rule 3(g) Statement ¶ 30.) At the meeting, Tran had said he would send the Kenmore's manager to meet with Rudman and representatives of NYPD the next day. The manager did not come; Tran called to say that a new manager — a retired police officer — was going to be hired, but there is no evidence that such a manager was ever hired. (Rule 3(g) Statement ¶ 31 n.2.)

Jude appears to have made scant effort to adopt Rudman's

recommendations. For example, Jude "never provided formal identification for tenants." (Rule 3(g) Statement ¶ 39.) The lone security guard at the front desk of the Kenmore was not uniformed, and whenever he left the desk, it was unattended. (Rule 3(g) Statement ¶ 38.) Agents later found what appeared to be "sign-in" sheets that visitors to the Hotel were to sign before entering the building; some of the visitors signed in with such names as "Panama" and "Fat Boy." (Rule 3(g) Statement ¶ 47.) Further, "[w]hile a lock with a buzzer system was installed on the front door to the Kenmore Hotel in 1993, the mechanism functioned for approximately one week and has not been operating since that time." (Rule 3(g) Statement ¶ 37.) A "surveillance camera in the lobby area lead [*sic*] to a monitor on the second floor in the hotel manager's bedroom, ... but [wa]s not monitored on a routine basis." (Rule 3(g) Statement ¶ 40.) And "[v]acant apartments in the building were often not secured." (Rule 3(g) Statement ¶ 41.) During a period of little more than two months in late 1993, police officers found crack and drug paraphernalia in several vacant rooms that had been left unsecured. (*E.g.*, Rule 3(g) Statement ¶¶ 14, 16, 17.) Officers also intercepted drug dealers in hallways and stairwells.

According to Jude's accountant, from October 1, 1992, to September 30, 1993, Jude spent only $1,250 on security services at the Kenmore Hotel. (Rule 3(g) Statement ¶ 43.) From the records produced by Jude, it appears that those who provided security services during this period were "unconnected to any professional company." (Rule 3(g) Statement ¶ 45.) Further,

> [w]hile TRUONG employed some uniformed security guard services in 1993 and 1994, these services terminated their work at the Kenmore Hotel because of

> TRUONG's failure to pay the bills related to such services. . . . As replacements for the uniformed security guards, TRUONG hired tenants at the building to work as security guards, many of whom had no training as security guards.

(Rule 3(g) Statement ¶ 23.) Jude paid its new security guards $2.50 per hour. (Rule 3(g) Statement ¶ 27.) Some of these guards took bribes from individuals seeking entry into the building; some steered customers to narcotics suppliers; some were arrested for narcotics activity of their own. (Rule 3(g) Statement ¶ 24.)

In addition to Aptekar's notifying Cham and ADA Rudman's notifying Truong and Tran of the narcotics problem in the Kenmore Hotel, the problem generated "at least nine" newspaper articles on the Hotel beginning in December 1993, describing the Kenmore as, *inter alia*, a crime haven and New York's most dangerous SRO. One article "quote[d] a former security guard who stated that because he was paid so poorly by Tran, 'he had no choice but to take payoffs from drug dealers who wanted to enter the building.' " (Rule 3(g) Statement ¶ 34.) "After publication of the articles, neither TRUONG nor any representative of the Kenmore Hotel made any attempt to contact ADA Rudman or the United States Attorney's Office." (Rule 3(g) Statement ¶ 35.) And according to housing court records, though Jude instituted more than 500 actions to evict tenants for nonpayment of rent, it never instituted eviction proceedings based on narcotics activity. (Rule 3(g) Statement ¶ 42.)

In 1994, narcotics activity at the Hotel escalated. Of the narcotics-related incidents recorded by the local authorities in

1991-1994, nearly 60% occurred during the first five months of 1994, and nearly 50% occurred during April and May of 1994 alone. Crime in general in the vicinity of the Kenmore, and community complaints about the Kenmore, increased as well. In May 1994, one 86-year-old tenant was found strangled to death in a communal bathroom.

In continuing the Kenmore investigation in 1994, NYPD sent undercover officers ("UCs") and a confidential informant into the Hotel.

> These UCs purchased crack on 13 occasions between on or about March 16, 1994 and May 30, 1994. . . . The UCs easily gained access to the building and were often "steered" to the crack dealers by the "security guards." . . . . On certain occasions, they paid a security guard some amount of money, sometimes as little as one dollar, to gain access to the building.

(Rule 3(g) Statement ¶ 20.) One guard offered, for a price, to tell police that the UCs inside the Hotel were there to visit relatives. The confidential informant ("CI"), who had previously provided law enforcement agents with reliable information, posed as a supplier of crack and cocaine and paid security guards as much as $10 to let him into the Hotel. On one such occasion,

> the security guard . . . indicated to the CI that he (the security guard) had collected $200 in bribes on that day from people seeking entry into the Kenmore Hotel. . . . Many of these bribes came from people the security guard

> knew were entering the Kenmore Hotel to buy crack.

(Rule 3(g) Statement ¶ 21.) On his visits to the Hotel, the CI met several individuals who sold crack; he witnessed several crack sales; and he was physically threatened by several crack dealers who thought he was trying to steal their business.

In early June 1994, the government filed the present civil forfeiture complaint and seized the building. During the seizure, the government found tenant application forms that were incomplete. (Rule 3(g) Statement ¶ 46.) From late 1993 through May 1994, Jude got most of its tenants through referrals from Soho Realty Company. Soho's owner-president Albert Imano testified that though he had applicants fill out a one-page form that asked certain pedigree information, he did not, for the most part, require the prospective tenants to complete the forms; nor did he investigate the background of those individuals before placing them in a building or give the forms to the management of the Kenmore. (Rule 3(g) Statement ¶ 51.)

3. *The Value of the Property*

Jude bought the property in 1985 for approximately $7.9 million. However, at the time of the summary judgment motion,

> [b]ased on a market appraisal and the two most recent offers to purchase the Kenmore Hotel, the building ha[d] a gross value of between $3.0 and $3.45 million, without offsetting the value of liens and mortgages on the building. . . . The mortgages and liens [we]re currently valued at approximately

> $1.5 million. . . . Other costs, fees and liabilities of the building total[ed] as much as $1.6 million.

(Rule 3(g) Statement ¶ 8.) In addition, the United States Marshal's Service may file on the property a lien valued between $1 and $4,000,000. (Rule 3(g) Statement ¶ 5.)

B. *The District Court's Decision*

Jude, in opposing summary judgment, did not submit a counterstatement pursuant to Rule 3(g) and presented no countervailing evidence. Its memorandum of law was devoted solely to the Excessive Fines Clause issue and argued that "since forfeiture is now considered punishment to the owner of the defendant-in-rem property," the question was whether it

> is . . . a violation of the Eighth Amendment's "Excessive Fine[ ]s" Clause to order forfeiture of property where the claimant/owner is not involved in the criminal acts underlying the forfeiture, and has derived no personal benefits from the criminal activity.

(Jude's Memorandum of Law in Support of its Claim that Forfeiture of the Defendant-In-Rem Property Violates the Excessive Fines Clause of the Eighth Amendment ("Eighth Amendment Memorandum") at 2.) The memorandum emphasized that Jude and Truong themselves had not been accused of criminal activity, and it argued that "it was apparent" that Jude

> was practically unable to do anything

> because of the overwhelming [ ]problem of drug trafficking in New York City. . . . Therefore, as a matter of law, the forfeiture in this case would offend the Eighth Amendment as an "Excessive Fine."

(*Id.* at 16-17.) Although Jude also made several factual assertions in its memorandum, stating for example, that it "did not condone the illegal activity," that it had sought the assistance of the Manhattan District Attorney's Office, that it had "install[ed] additional electronic security equipment including a buzzer system and closed-circuit video cameras," that it had "increas[ed] security presence" and allowed the police access to the hotel, and that it had "institut[ed] and prosecut[ed] numerous eviction proceedings in housing court against tenants" (*id.* at 4), it presented no affidavits, documents, or other materials that would have been proper under Fed. R. Civ. P. 56 to support or expand upon its factual assertions, and it took no issue with any fact asserted in the government's Rule 3(g) Statement. Truong sent the court a five-page letter, attempting to contest some of the facts set out in the Rule 3(g) Statement and to paint Jude as having made many attempts to rid the Hotel of narcotics activity; but his letter was unsworn.

The district court, in an Opinion dated June 12, 1995, reported at 888 F. Supp. 580, granted the government's motion for summary judgment. Preliminarily, the court stated that it accepted the facts set out in the Rule 3(g) Statement, pointing out that Jude had "entered into a letter agreement with the government . . . to have this matter resolved on the basis of the government's statement of undisputed facts." 888 F. Supp. at 581 n.1. The court noted its receipt of Truong's letter but stated that Truong's unsworn assertions (and an unsworn response thereto

by the government) were not proper submissions on a summary judgment motion and were not entitled to consideration. *Id.*

On the merit, the court held that the property was subject to forfeiture under 21 U.S.C. § 881(a)(7) as property used to facilitate the commission of narcotics felonies. The court noted that Jude, despite having notice of the substantial narcotics activity at the Kenmore, "did not take any significant steps along the lines suggested by ADA Rudman, even though drug trafficking continued and even increased at the Kenmore Hotel after the meeting with Rudman." 888 F. Supp. at 582. The court noted, *inter alia*, that Jude rented apartments to persons as to whom it had conducted no background inquiry; that Jude failed to provide tenants with photo identifications so that the "guards, were they so inclined, could distinguish the hundreds of tenants that lived at the Kenmore at any given time from the numerous visitors," *id.*; that though Jude installed a front-door buzzer, the buzzer worked for only a week and was never fixed or replaced; that the surveillance camera "went largely unwatched"; that vacant apartments were unsecured, providing narcotics dealers with operating and storage space; that in lieu of trained, uniformed guards, Jude hired as guards Hotel tenants whom it paid only $20 per eight-hour shift; that the guards took bribes for allowing potential drug buyers to enter the building and for steering them to drug suppliers; and that some of the guards also sold drugs themselves. The court concluded that, as a matter of law, Jude could not establish a statutory defense to forfeiture because

> [t]he claimant does not dispute that the Kenmore Hotel was used for drug trafficking and that the claimant knew about the trafficking. The claimant's token efforts to

> correct the problems that is own mismanagement and neglect helped to create, fall far short of the diligence required to establish lack of consent.

Id. at 583.

Turning to Jude's contention that the proposed forfeiture would violate the Excessive Fines Clause, the district court analyzed the question in two ways. First, looking to this Court's decision in *United States v. Certain Real Property and Promises Known as 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29 (2d Cir.) ("*Whalers Cove*"), *cert. denied*, 113 S. Ct. 55, 121 L. Ed. 2d 24 (1992) the district court applied a strict proportionality test, analyzing the forfeiture "as though it were a monetary fine comparable in magnitude to the claimant's financial interest in the property and compared it to monetary fines that could be imposed on the sort of misconduct in which the claimant engaged." 888 F. Supp. at 583. Using the *Whalers Cove* analysis, the court found the forfeiture was not excessive. The court noted, *inter alia*, that it is a criminal offense for the owner of a building to "manage or control [the] building . . . or make available for use, with or without compensation, the building . . . for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance," 21 U.S.C. § 856(a)(2) (1994), and that a violation of this section subjects a corporate defendant to a fine of up to $2,000,000. The court observed that this section had been applied to a motel owner "who was aware of (or at least willfully blind to) the fact that the motel had been overrun by drug dealers." 888 F. Supp. at 585 (citing *United States v. Chen*, 913 F.2d 183, 191 (5th Cir. 1990)).

The court accepted the valuations of the property set forth in

the Rule 3(g) Statement, which were based on a recent appraisal and recent offers of purchase, reduced by the amounts of outstanding mortgages and liens and the cost of bringing the building into conformity with housing regulations. Without considering possible further reductions for any liens that the United States Marshals Service might be entitled to impose, the court found that Jude's equity in the building was between $0 and $500,000 and therefore treated the proposed forfeiture as the equivalent of a monetary fine of up to $500,000. Measuring Jude's maximum $500,000 equity interest against the $2 million potential fine for a violation of § 856(a)(2), the court concluded that the prescribed maximum punishment was at least four times Jude's equity interest in the property, and that, "[v]iewed as punishment for the claimant permitting its property to be used for drug trafficking, such a fine is not excessive." 888 F. Supp. at 585.

Alternatively, the court found that the proposed forfeiture would not be unconstitutionally excessive under a multi-factor analysis, rather than a strict proportionality test:

> The claimant has urged this Court to apply a multifactor test of the claimant's own invention, under which "the government [must] show that the claimant was culpable and that the property was a material part of serious criminal activity." Claimant's Brief at 14. The claimant argues that the proposed forfeiture would be unconstitutionally excessive under its test, because Jude Hotel's lack of active participation in any narcotics trafficking absolves it of any culpability punishable by forfeiture and because the

property itself is not sufficiently related to the trafficking to be forfeited, the Kenmore Hotel being merely a place where drugs happened to be sold.

. . . . Even if the Second Circuit were to apply the claimant's suggested factors, the forfeiture of the Kenmore Hotel would still not violate the Excessive Fines Clause. Both prongs of the claimant's test point in favor of permitting the proposed forfeiture: Jude Hotel is culpable for the drug trafficking at the Kenmore Hotel, and a substantial relationship does exist between the hotel and the trafficking that occurred there.

Jude Hotel's attempt to deny it culpability for the narcotics trafficking is contradicted by the undisputed facts of this case, which establish that the claimant failed to take any significant action to stop drug trafficking at the Kenmore despite receiving ample notice of the problem. The claimant's management of the hotel facilitated its use as a site for drug trafficking: its practice of using inadequately paid and untrained tenants as security guards for the Kenmore Hotel affirmatively facilitated drug trafficking at the Kenmore by creating an incentive for these "guards" to accept bribes in return for access to the hotel and otherwise to cooperate with the drug dealers, its failure to secure vacant apartments supplied drug dealers with

> locations for storing and selling drugs, and its willful blindness to the dangers of accepting tenants without making any effort to check their backgrounds.
>
> The relationship between the Kenmore Hotel and the drug trafficking that occurred there is sufficiently strong to sustain the proposed forfeiture against an Excessive Fines Clause challenge. The Kenmore Hotel provided seclusion and privacy for the consummation of drug transactions and for the storage of drugs and drug paraphernalia. Four courts that have interpreted the Excessive Fines Clause to require a showing of a relationship between the forfeited property and illegal activity have found this relationship to be sufficient.

Id. at 585-86 (footnote omitted).

> The undisputed facts of the instant case demonstrate that, under the claimant's management, the Kenmore Hotel provided a degree of seclusion for drug activity in excess of the seclusion that one could obtain from an ordinary hotel. The physical decay of the hotel itself provided drug traffickers with unlocked, vacant rooms in which to store their drugs, and the defective door buzzer and the location of the security camera monitor facilitated illicit access to the building. The

> ineffectiveness and corruption of the tenant-guards has already been described.

Id. at 586-87.

Judgment was entered in favor of the government, and this appeal followed.

II. DISCUSSION

On appeal, Jude contends principally that the district court did not apply the proper legal standard for assessing Jude's Eighth Amendment contention and in any event erred in concluding that there was no Excessive Fines Clause violation. It also argues that summary judgment could not properly be granted because there were issues of fact for trial. For the reasons below, we see no error in the district court's constitutional ruling, for though its decision was rendered prior to this Court's opinion in *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995) ("*Milbrand*"), which established a standard for analysis of Excessive Fines Clause contentions in civil *in rem* forfeiture cases, and though in deciding a case on direct appeal, we are to apply the law as it exists at the time of our decision of the appeal, *see, e.g., Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2513 (1993), we conclude that the district court's findings and alternative analysis were sufficient under the *Milbrand* standard. We also conclude that Jude waived its opportunity to assert that summary judgment was inappropriate on the ground of any factual dispute; and, in any event, we conclude that there were no genuine issues of material fact to be tried and that the undisputed facts showed that the government was entitled to judgment as a matter of law. We address Jude's challenge to the availability of summary judgment first.

Appendix A

A. *Forfeiture and Summary Judgment*

Subchapter I of Title 21, chapter 13, dealing with the enforcement of prohibitions against activities involving controlled substances, *see* 21 U.S.C. §§ 801-904 (1994), subjects to civil forfeiture all real property

> which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited . . . by reason of any act or omission established by th[e] owner to have been committed or omitted without the knowledge or consent of that owner.

Id. § 881(a)(7). Once the government has shown probable cause to believe that property is subject to forfeiture, the burden of proof shifts to the claimant opposing forfeiture to establish by a preponderance of the evidence that the narcotics activity on the property occurred without its knowledge or, if it had knowledge, without its consent. *See United States v. Two Parcels of Property Located at 19 & 25 Castle Street*, 31 F.3d 35, 39 (2d Cir. 1994).

In order to demonstrate a lack of consent, the claimant must prove that it did " '*all* that reasonably could be expected to prevent the illegal activity once [it] learned of [the activity].' " *Id.* (quoting, with emphasis, *United States v. 141st Street Corp.*, 911 F.2d 870, 879 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)). As we stated in *United States v. Certain Real Property & Premises, Known as 418 57th Street, Brooklyn New York*, 922 F.2d 129 (2d Cir. 1990):

> Congress intentionally placed a significant burden upon owners to remain accountable for the legitimate use of their property. Therefore, we balance [ ] our determination of the knowledge-consent issue with a stringent interpretation of consent . . . .

Id. at 132. "Unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail the drug-related activity, consent is inferred and the property is subject to forfeiture." *Id.*

In some cases, a claimant's defense of lack of knowledge of lack of consent can be decided as a matter of law. *See, e.g., United States v. One Parcel of Property, Located at 755 Forest Road, Northford, Connecticut*, 985 F.2d 70, 73 (2d Cir. 1993) (affirming summary judgment against claimant). In others, a trial will be required. *See, e.g., United States v. Certain Real Property & Premises, Known as 418 57th Street, Brooklyn, New York*, 922 F.2d at 132 (citing "fair dispute" as to whether contacting attorney was all that reasonably could have been done or whether other steps suggested by the government would have been productive); *see also United States v. One Parcel of Property Located At 21 Allen Place*, No. 94-6242, slip op. at 1261 (2d Cir. Jan. 26, 1996) (reversing grant of judgment as a matter of law after jury verdict in favor of claimant on defense of lack of consent).

The record of the present case in the district court did not create any need for a trial. Consistent with its pre-motion representation to the district court, Jude did not submit a Rule 3(g) Statement of its own; thus, under Rule 3(g), the facts set out in the government's Rule 3(g) Statement were deemed admitted.

Nor did Jude submit any factual materials pursuant to Rule 56. The submission of Truong's unsworn letter was an inappropriate response to the government's motion for summary judgment, and the factual assertions made in that letter were properly disregarded by the court. *See, e.g.*, Fed. R. Civ. P. 56(e) (response to properly supported summary judgment must be "by affidavits or as otherwise provided in this rule," *see, e.g.*, Fed. R. Civ. P. 56(c) ("depositions, answers to interrogatories, and admissions on file, together with the affidavits")).

Nor can we endorse Jude's tactic of contending on appeal that summary judgment was inappropriate on the ground that there were issues of fact to be tried after it had declined to dispute the government's Rule 3(g) Statement, had made no proper proffer of any factual dispute, and had represented to the district court that "there will be no need for a trial" (Joint Government-Jude Letter at 2). Jude's opportunity to argue that there were genuine issues of fact to be tried was deliberately bypassed.

In any event, the record reveals no genuine issue to be tried, either as to the facts set out in the Rule 3(g) Statement or as to what inferences should be drawn therefrom. Those facts as to the scope of the narcotics activity, Jude's knowledge of it, and its lack of any meaningful response to the notice of narcotics activity from many sources, are set forth in some detail in Part I.A. above. Jude came forward with no evidence to controvert the undisputed facts. For example, although its Eighth Amendment Memorandum stated that Jude had installed a front-door buzzer at the Hotel, Jude did not attempt to dispute the fact that the buzzer broke within a week after installation, and it submitted no evidence to show either that it did not know the buzzer had broken or that it made any effort to have the buzzer fixed. Although its Eighth Amendment Memorandum stated that Jude

was "practically unable to do anything" to impede the narcotics activity at the hotel, Jude submitted no evidence that it made any effort to, for example, provide tenants with identification cards, or screen visitors, or secure vacant rooms, or keep common areas such as hallways and stairwells well lighted. Although its Eighth Amendment memorandum stated that Jude had instituted and prosecuted "numerous eviction proceedings in housing court," Jude submitted no evidence to counter the Rule 3(g) Statement's representation that the records of that court revealed more than 500 eviction actions by Jude for nonpayment of rent but not one for narcotics activity. And although its Eighth Amendment Memorandum stated that Jude had "increas[ed] security presence." Jude submitted no evidence to controvert the Rule 3(g) Statement's revelation that Jude hired untrained tenants as guards and paid them at the rate of $2.50 an hour, nor anything to controvert Jude's accountant's evidence that the amount Jude spent on guards for the Kenmore in the one-year period from October 1, 1992, to September 30, 1993, amounted to less than $3.50 a day, *i.e.*, less than 15 cents an hour.

In light of the undisputed facts set out in the Rule 3(g) Statement, no reasonable factfinder could conclude that Jude took all reasonable measures to deter drug trafficking at the Kenmore Hotel.

B. *The Excessive Fines Clause Argument*

Jude contends that the district court did not apply the proper standard, *i.e.*, that set out in *Milbrand*, 58 F.3d 841, in assessing whether the forfeiture constituted an excessive fine. Although the district court's decision was rendered prior to our decision in *Milbrand*, we conclude that its alternative analysis adequately considered the pertinent *Milbrand* factors.

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In *Milbrand*, we considered the standard to be applied in assessing the applicability of the Excessive Fines Clause to civil *in rem* forfeitures in the wake of the Supreme Court's post-*Whalers Cove* decision in *Austin v. United States*, 113 S. Ct. 2801 (1993). In *Milbrand*, we noted the proportionality analysis that had been used in *Whalers Cove* and we concluded that, although proportionality is a factor to be considered, the proper test is "a multi-factor test combining the principles of both instrumentality and proportionality." 58 F.3d at 847. We stated that the factors to be considered by a court in determining whether a forfeiture violated the Excessive Fines Clause included

> (1) the harshness of the forfeiture (*e.g.*, the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.

Id. at 847-48.

Although the district court in the present case ruled that the *Whalers Cove* test was applicable, it also considered an alternative multi-factor test and substantially reviewed the

above factors of harshness, relationship, and owner culpability. For example, as to harshness, the court concluded, *inter alia*, that the forfeiture would not be disproportionate in light of the fact that Jude's loss of its $0-to-$500,000 equity interest was at most 1/4 of the sentence that could be imposed on Jude as an owner that had allowed its building to be used for narcotics offenses.

As to the relationship between the property and the offense, the court concluded, *inter alia*, that "a substantial relationship does exist between the hotel and the trafficking that occurred there" because the Kenmore "provided seclusion and privacy for the consummation of drug transactions and for the storage of drugs and drug paraphernalia," 888 F. Supp. at 585-86, and "that, under the claimant's management, the Kenmore Hotel provided a degree of seclusion for drug activity in excess of the seclusion that one could obtain from an ordinary hotel," *id.* at 586-87. The court noted the trade in crack cocaine had been "brisk" between January 1991 and June 6, 1994, and that the "drug dealing was widespread in the building" and "extensive." *Id.* at 581.

As to the degree of the owner's culpability, the court noted that Jude admittedly "knew about the trafficking," and "that its own mismanagement and neglect helped to create" the problems. *Id.* at 583. The court note that "[d]espite the extensive nature of the drug trafficking conducted at the Kenmore Hotel, complaints from tenants, and media coverage of the Hotel's drug problem, Jude Hotel did virtually nothing to improve conditions," *id.* at 582; that Jude "did not take any significant steps" to hinder such trafficking "[i]n spite of the warnings: and recommendations it had received from local law enforcement officials, *id.*; that Jude had been "willful[ly] blind[ ]" to the dangers of accepting tenants without any screening effort, *id.* at 586; and that Jude "facilitated [the Hotel's] use as a site for drug

trafficking" and "affirmatively facilitated drug trafficking" through its use of underpaid guards "by creating an incentive for these 'guards' to accept bribes in return for access to the hotel and otherwise to cooperate with the drug dealers," *id.* at 585-86. The court noted that, after Jude failed to take any meaningful steps despite receiving official warnings, "drug trafficking [at the Kenmore] continued and even increased," *id.* at 582, and concluded that "Jude Hotel is culpable for the drug trafficking at the Kenmore Hotel," *id.* at 585.

The district court adequately considered the relevant *Milbrand* factors. Its amply supported conclusions as to those factors demonstrate that the *Milbrand* test was met.

CONCLUSION

We have considered all of Jude's arguments on this appeal and have found them to be without merit. The judgment of forfeiture is affirmed.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 12, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 4148 (MP)

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY AND APPURTENANCES THERETO KNOWN AS 143-147 EAST 23RD STREET, NEW YORK, NEW YORK, LISTED AS BLOCK 879, LOT 27 WHICH INCLUDES THE KENMORE HOTEL,

Defendant-in-rem.

APPEARANCES

Mary Jo White
United States Attorney for the
Southern District of New York
(Ellen Silverman Zimiles and
Kenneth M. Karas of counsel)
One St. Andrew's Plaza
New York, New York 10007

Appendix B

Rochman, Platzer, Fallick,
Rosmarin & Sternheim
(Barry M. Fallick of counsel)
Attorney for claimant Jude Hotel
Corporation
666 Third Avenue
New York, New York 10017

OPINION

MILTON POLLACK, Senior District Judge:

This is an *in rem* civil forfeiture action pursuant to 21 U.S.C. § 881(a)(*l*). The government has moved for summary judgment under Fed.R.Civ.P. 56. The claimant-owner's sole argument against the proposed forfeiture is that it would violate the Excessive Fines Clause of the Eighth Amendment.

The motion will be granted for the reasons stated below.

Background[1]

The defendant-in-rem, 143-147 East 23rd Street, New York,

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1. The facts recited herein are taken basically from the government's Statement of Material Facts Not in dispute Pursuant to Civil Rule 3(g) and supporting documentation thereto. Counsel for the claimant Jude Hotel Corporation entered into a letter agreement with the government, a copy of which is appended to the government's memorandum of law, to have this matter resolved on the basis of the government's statement of undisputed facts.

However, on May 5, 1995, the claimant's majority shareholder, Truong Dinh Tran, submitted an unsolicited letter to the Court stating his own view of (Cont'd)

New York, consists of the Kenmore Hotel, a single room occupancy apartment building mainly occupied by poor or elderly tenants, four street-level commercial leaseholds, and a basement swimming pool. The building is across the street from Baruch College, two blocks away from a school for disabled children, and diagonally across from the headquarters of United Cerebral Palsy. Claimant Jude Hotel Corporation ("the claimant" or "Jude Hotel") owns the property. Jude Hotel's majority shareholder, Truong Dinh Tran, purchased the property for $7.9 million in November 1985, in order to generate losses that would shelter income from other hotels owned by Truong. Under Jude Hotel's management, the building has fallen into serious disrepair and accumulated numerous citations for housing code violations. Taking into consideration outstanding mortgages and liens and the costs to bring the building into conformity with the housing code, Jude Hotel's equity in the building is somewhere between $0 and $500,000, based on an appraisal conducted in September 1994, and on two offers to purchase the building made in mid-1995.[2]

(Cont'd)
the facts. The government has responded by letter in which it alleges that Truong's allegations are either false, incomplete, or irrelevant to the material issues of fact in this case. Neither of these letters is technically entitled to consideration as appropriate submissions for or on the pending motion; each lacks essential evidentiary character. *See* 28 U.S.C. § 1746 (permitting unsworn declarations to substitute with like force and effect for an affidavit only if "subscribed by [the declarant], as true under penalty of perjury"); *Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980) ("It is an unsworn statement, which the court may not consider in determining the propriety of summary judgment.").

2. This estimate does not take into account any liens that the United States Marshalls Service, which presently manages the Kenmore Hotel, may be entitled to impose on the property.

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A brisk trade in crack cocaine developed at the Kenmore Hotel, the transactions being conducted in unoccupied apartments and in the common areas throughout the building. Between January 1991, and June 6, 1994, there were numerous narcotics arrests and reported incidents of narcotics-related activity in and around the Kenmore Hotel. New York police officers also seized drugs and drug paraphernalia, including hundreds of vials used to package crack cocaine, from vacant rooms and common areas of the building.

Based on the history of narcotics activity in the Kenmore Hotel, the Manhattan South Narcotics Division launched an investigation using undercover officers and a confidential informant to purchase narcotics in the Kenmore Hotel. This investigation established not only that drug dealing was widespread in the building but also that the security guards at the Kenmore facilitated the narcotics trafficking. Although Jude Hotel intermittently employed some uniformed security guard services in 1993 and 1994, these services terminated their work at the Kenmore Hotel because of Truong's failure to pay them. In lieu of uniformed security guards, Truong hired tenants from the Kenmore Hotel and from the Carter Hotel, another of Truong's properties, paid them only $20 per eight-hour shift, and failed to provide them with uniforms or training. These security guards allowed potential drug buyers to gain access to the building and directed them to drug suppliers in return for a bribe. One guard offered to tell any police who inquired that undercover officers posing as buyers were merely visiting relatives at the hotel, and another warned an undercover officer entering the building that police were conducting an investigation inside. Some of the guards also sold drugs themselves.

Despite the extensive nature of the drug trafficking

conducted at the Kenmore Hotel, complaints from tenants, and media coverage of the hotel's drug problem, Jude Hotel did virtually nothing to improve conditions. This was not for lack of notice. In November 1992, the Manhattan District Attorney's Office requested a meeting with Truong to discuss a strategy to combat drug trafficking at the Kenmore. In February 1993, La Tran, one of Truong's associates, met with Assistant District Attorney Anne Rudman, who advised him that the Kenmore Hotel was being used to facilitate drug trafficking and urged him to take reasonable steps to try to stop the drug activity, such as hiring full-time uniformed security guards, screening prospective tenants, using a surveillance camera, providing a photo identification card for tenants, and considering hiring a temporary management team to take over the hotel and clean it up. ADA Rudman also asked Tran to sign a form affidavit authorizing the NYPD to patrol all the floors and arrest trespassers, which Tran did not sign. These recommendations were subsequently memorialized in a letter to Tran dated February 25, 1993, which also informed Tran that officials would seek assistance from the federal government in bringing an action pursuant to the federal forfeiture laws in the event that his cooperation was not forthcoming.

In spite of the warnings, the claimant did not take any significant steps along the lines suggested by ADA Rudman, even though drug trafficking continued and even increased at the Kenmore Hotel after the meeting with Rudman. Although the claimant did install a buzzer on the front door, that buzzer broke within one week of its installation and was never fixed. Even though a surveillance camera was placed in the lobby of the Kenmore, the monitor was placed in the bedroom of one of Truong's associates and went largely unwatched. The claimant continued to employ tenants as security guards and failed to

provide tenants with photo identification so that these guards, were they so inclined, could distinguish the hundreds of tenants that lived at the Kenmore at any given time from the numerous visitors to the Kenmore. The claimant also accepted over 100 tenants placed by a real estate company that regularly placed individuals who had come from prison or had criminal records, and the claimant did so without asking to see application forms that these tenants had completed for the real estate company. The claimant rented to these tenants even though some of them had already been rejected as tenants by the Carter Hotel.

On June 6, 1994, the government filed under seal a verified complaint against the property that sought forfeiture under 21 U.S.C. § 881(a)(7) based on distribution of cocaine at the Kenmore Hotel in violation of 21 U.S.C. § 841(a)(1). On the same day, the Honorable John E. Sprizzo, United States District Judge for the Southern District of New York, issued a seizure warrant pursuant to 21 U.S.C. § 881(b), permitting the Government to seize the Kenmore from Claimant Jude Hotel Corporation and to manage it pending the resolution of the Government's forfeiture action. In authorizing the seizure of the defendant-in-rem property, Judge Sprizzo found that there existed exigent circumstances that excused the Government from providing pre-seizure notice to the Claimant Jude Hotel Corporation and from attending a pre-seizure hearing.[3] Under the authority of the seizure warrant issued by Judge Sprizzo, the Government seized the Kenmore Hotel on June 8, 1994.

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3. Claimant Jude Hotel Corporation has made no challenge to Judge Sprizzo's seizure warrant.

Appendix B

Discussion

I. The property is subject to forfeiture.

The basis for the proposed forfeiture is 21 U.S.C. § 881(a)(7), which provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The government bears the initial burden of demonstrating probable cause to believe that the property is subject to forfeiture, and the claimant opposing forfeiture bears the ultimate burden of establishing one of two defenses to forfeiture: that the property was not in fact used for illegal purposes or that

the illegal use was without the claimant's knowledge or consent. *See United States v. Two Parcels of Property at Castle Street*, 31 F.3d 35, 39 (2nd Cir. 1994).

The government has established probable cause to believe that the Kenmore Hotel was used for drug trafficking in violation of 21 U.S.C. § 841(a)(1). *Cf. Castle Street*, 31 F.3d at 39 (holding that probable cause to forfeit a house was established by evidence that "many narcotics sales took place in the driveway between the garage and the residence, and on the street in front of the garage" and that "thirty-two packets of heroin were found in the garage drainpipe"). The Court also finds that the claimant cannot as a matter of law meet its burden of establishing a defense to forfeiture. The claimant does not dispute that the Kenmore Hotel was used for drug trafficking and that the claimant knew about the trafficking. The claimant's token efforts to correct the problems that its own mismanagement and neglect helped to create, fall far short of the diligence required to establish lack of consent. *See United States v. 141st Street Corp.*, 911 F.2d 870, 879 (2nd Cir. 1990) (holding that a claimant must prove "that he did all that reasonably could be expected to prevent the illegal activity once he learned of it" in order to establish lack of consent), *cert. denied*, 498 U.S. 1109 (1991).

II. The proposed forfeiture is not excessive.

In *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29 (2nd Cir.) *cert. denied*, 113 S.Ct. 55 (1992) ("*Whalers Cove*"), the Court analyzed the excessiveness of an *in rem* forfeiture under a *proportionality* test that treated the challenged forfeiture as though it were a monetary fine equal in magnitude to the claimant's financial interest in the property and compared it to

monetary fines that could be imposed on the sort of misconduct in which the claimant engaged. *Whalers Cove* dealt with a condominium in which the owner had a $68,000 equity interest and involved, inter alia, an Excessive Fines Clause challenge to the forfeiture pursuant to 21 U.S.C. § 881(a)(7) on account of the owner's sale of $250 worth of drugs inside the condominium. The Court first concluded that the forfeiture of the condominium was presumptively punitive because of the disparity between the value of the drugs sold and the claimant's equity interest and because the government did not contend that the condominium was forfeitable as an instrumentality of crime. *See id.* at 37. However, the Court then held that, it was not unconstitutionally excessive even if if the forfeiture were in fact punitive in nature ("[j]udging from the penal laws of the United States and the various states mentioned above [in the Court's discussion of a challenge to the forfeiture under the Cruel and Unusual Punishments Clause], a fine of many thousands of dollars for a minor drug offense is not beyond the pale." *Id.* at 39).[4]

Subsequent to *Whalers Cove*, the Supreme Court considered the applicability of the Excessive Fines Clause in *Austin v. United States*, 113 S.Ct. 2801 (1993) and ruled that the Excessive Fines Clause applied to all forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7), because "forfeiture under these

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4. The Court does not interpret *Whalers Cove* to mean that the government can never obtain the forfeiture of property whose value far exceeds the magnitude of the monetary fines that could be imposed on the claimant's misconduct. The *Whalers Cove* Court was careful to note that it did not determine "at exactly what point a fine or forfeiture might violate the Excessive Fines Clause, because wherever such a line could be drawn, this forfeiture would be proper." *Id. Whalers Cove* does not tell us what an excessive forfeiture *is*, only what it is *not*; it is essentially a "safe harbor" rule for *in rem* forfeitures.

provisions constitutes 'payment to a sovereign as punishment for some offense' . . . ." *Id.* at 2812 (quoting *Browning-Ferris Industries, Inc. v. Kelco*, 492 U.S. 257, 265 (1989)).

Austin v. United States does not overrule *Whalers Cove*'s *proportionality* test of excessiveness. The Supreme Court expressly declined to place limits on and failed to express standards by which to determine whether a particular forfeiture was excessive. *See Austin*, 113 S.Ct. at 2812 n.15 ("We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive."). Thus, a subsequent district court case relied again on the doctrine of *Whalers Cove* in the determination of what constitutes excessiveness. "The majority opinion in *Austin* clearly and unequivocally stated that it was for the circuit courts to fashion appropriate tests to determine whether a forfeiture is constitutionally excessive, and in this Circuit *Whalers Cove* controls." *United States v. Real Property: 835 Seventh Street Rensselaer, Rensselaer County, New York*, 832 F. Supp. 43, 48 (N.D.N.Y. 1993) (citation omitted) (declining to reconsider summary judgment in favor of claimant, in which the court held that the proposed forfeiture violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, where the government argued that *Austin* required a different analysis of Eighth Amendment challenges to *in rem* forfeitures).[5]

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5. The claimant has cited *U.S. v. Premises Known as RR No. 1*, 14 F.3d 864 (3rd Cir. 1994), as questioning the continuing validity of *Whalers Cove*. However, that case does not question the validity of the test that the Second

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However, *Austin* does create some uncertainty as to the proper comparison to be made under the *Whalers Cove proportionality* test. In *Whalers Cove*, the Second Circuit compared the forfeiture to the fines that various jurisdictions might impose on one who sells drugs. However, the majority in *Austin* concluded that the traditional justifications for *in rem* forfeiture "rest, at bottom, on the notion that the owner has been negligent in allowing its property to be misused and that he is properly punished for that negligence." *Austin*, 113 S.Ct. at 2808. This suggests that the proper comparison is to the monetary fines that might be imposed on an owner for permitting his property to be used as a site for drug trafficking, especially in a case in which the claimant itself did not sell drugs. Because the owner in *Whalers Cove* both sold drugs and allowed his property to be used to sell drugs, so that the forfeiture could be viewed as punishment for either type of misconduct, this question was not clearly presented to the Second Circuit in *Whalers Cove*.

Regardless of this uncertainty, the forfeiture proposed in this case does not violate the Excessive Fines Clause. The claimant's equity in the Kenmore Hotel is estimated to be

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(Cont'd)

Circuit applied once it determined that the Excessive Fines Clause was implicated by the facts of the case. The Third Circuit's opinion questioned the validity only of the Second Circuit's Analysis of the applicability of the Excessive Fines Clause. *See Premises Known as RR No. 1*, 14 F.3d at 874 (noting that "[i]n light of the Supreme Court's holding in *Austin* that all civil forfeitures under § 881(a)(7) constitute punishment limited by the Eighth Amendment's Excessive Fines Clause, the analysis of the court of appeals in *38 Whalers Cove Drive* is questionable" but also recommending to district court on remand of Excessive Fines Clause issue that "the [proportionality] factors articulated in *38 Whalers Cove Drive* may offer some help in analyzing the excessiveness issue.").

between $0 and $500,00, so the proposed forfeiture is, for purposes of a *Whalers Cove* analysis, equivalent to a monetary fine of up to $500,000. Viewed as punishment for the claimant permitting its property to be used for drug trafficking, such a fine is not excessive. 21 U.S.C. § 856(a)(2) makes it a criminal offense to

> manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

A colorable criminal case may exist under this statute against the claimant; indeed, one court of appeals has sustained a conviction under § 856(a)(2) on facts similar to those in the instant action. *See United States v. Chen*, 913 F.2d 183, 191 (5th Cir. 1990) (affirming conviction under § 856(a)(2) of owner of a motel who was aware of (or at least willfully blind to) the fact that the motel had been overrun by drug dealers and holding that "§ 856(a)(2) does not require the person who makes the place available to others for drug activity to possess the purpose of engaging in illegal activity; the purpose in issue is that of the person renting or otherwise using the place."). A violation of this statute subjects a corporate defendant to a fine of up to $2,000,000, an amount at least four times greater than the claimant's equity interest in the Kenmore Hotel. *See* 21 U.S.C. § 856(b). Nor is the forfeiture unconstitutionally excessive when viewed as punishment for the underlying drug sales. Under 21 U.S.C. § 841(b)(1)(C), distribution of any amount of cocaine under 500 grams is punishable by a fine of up to $1,000,000 for an

individual defendant and up to $5,000,000 for a corporate defendant, and given the extent of the drug trafficking at the Kenmore Hotel, the weight of cocaine sold there may far exceed 500 grams.

III. The claimant would not prevail under the test that it proposes.

The claimant has urged this Court to apply a multifactor test of the claimant's own invention, under which "the government [must] show that the claimant was culpable and that the property was a material part of serious criminal activity." Claimant's Brief at 14. The claimant argues that the proposed forfeiture would be unconstitutionally excessive under its test, because Jude Hotel's lack of active participation in any narcotics trafficking absolves it of any culpability punishable by forfeiture and because the property itself is not sufficiently related to the trafficking to be forfeited, the Kenmore Hotel being merely a place where drugs happened to be sold.

The Court has concluded, however, that the Second Circuit in *Whaler Cove* has adopted a *proportionality* analysis that remains the law in the Circuit. Even if the Second Circuit were to apply the claimant's suggested factors, the forfeiture of the Kenmore Hotel would still not violate the Excessive Fines Clause. Both prongs of the claimant's test point in favor of permitting the proposed forfeiture: Jude Hotel is culpable for the drug trafficking at the Kenmore Hotel, and a substantial relationship does exist between the hotel and the trafficking that occurred there.

Jude Hotel's attempt to deny its culpability for the narcotics trafficking is contradicted by the undisputed facts of this case, which establish that the claimant failed to take any significant

action to stop drug trafficking at the Kenmore despite receiving ample notice of the problem. The claimant's management of the hotel facilitated its use as a site for drug trafficking: its practice of using inadequately paid and untrained tenants as security guards for the Kenmore Hotel affirmatively facilitated drug trafficking at the Kenmore by creating an incentive for these "guards" to accept bribes in return for access to the hotel and otherwise to cooperate with the drug dealers, its failure to secure vacant apartments supplied drug dealers with location for storing and selling drugs, and its willful blindness to the dangers of accepting tenants without making any effort to check their backgrounds.[6]

The relationship between the Kenmore Hotel and the drug trafficking that occurred there is sufficiently strong to sustain the proposed forfeiture against an Excessive Fines Clause challenge. The Kenmore Hotel provided seclusion and privacy for the consummation of drug transactions and for the storage of drugs and drug paraphernalia. Four courts that have interpreted the Excessive Fines Clause to require a showing of a relationship between the forfeited property and illegal activity have found

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6. The claimant contends that the actions of the security guards cannot be imputed to it in order to support a finding that Jude Hotel is culpable for the drug trafficking, because the guards supposedly were not acting to benefit the claimant. The claimant relies on *United States v. 4657 Acres in Martin County*, 730 F. Supp. 423, 426-27 (S.D. Fla. 1989), which held that, for purposes of defeating the innocent owner defense under 21 U.S.C. § 881(a)(7), neither knowledge of nor consent to drug trafficking in which 0.31% shareholder participated cannot be imputed to the corporation that owned the property sought to be forfeited, where the corporation did not stand to benefit from its shareholder's unauthorized actions. This reliance is misplaced no imputation of the guards' wrongdoing is necessary to establish that Jude Hotel knew about and consented to the drug trafficking occurring at the Kenmore Hotel.

this relationship to be sufficient. *See United States v. Chandler*, 36 F.2d 358, 366 (4th Cir. 1994) ("While it would appear that the farm had substantial purposes other than serving as an instrument of drug activity, the property nevertheless was an important, if not necessary, instrument for the drug activity, in providing a secluded location."); *cert. denied*, 115 S.Ct. 1792 (1995). *U.S. v. 9844 South Titan Court, Unit 9, Littleton, Colorado*, 865 F. Supp. 709, 715 (D.Colo. 1994) (holding that residence had sufficient connection to drug trafficking because its owner intentionally selected it "to conduct his drug activity in secret and secure from detection from the public and police" and because "the property was used to store the cocaine, store the money, take phone calls, an conceal weapons."); *United States v. One Parcel Property*, 853 F. Supp. 1389, 1399, 1402 (M.D. Ala. 1994) (holding that the government could establish the existence of a substantial connection between a grocery store and drug trafficking by proving "a pattern of illegal activities occurring at the defendant real property" and noting that the apparent legitimacy of the store "facilitated drug trafficking by making detection more difficult."); *United States v. One Parcel Property Located at 9638 Chicago Heights, St. Louis, Missouri*, 831 F. Supp. 736, 737 (E.D. Mo. 1993) (holding that forfeiture was not excessive because "Defendant real property was used as the situs for the storage and sale of cocaine and crack cocaine."), *reversed on other grounds*, 27 F.3d 327 (8th Cir. 1994).

Claimant relies on *United States v. Real Property at 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994), for the proposition that "the mere fact that the criminal activity occurred at the property does not make the property 'guilty' of an offense . . . ." *Id.* 737 (quoting *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 515 (1993) (Thomas, J. concurring in part and dissenting in part)). That case is distinguishable from the instant action, because the *6625*

Appendix B

Zumirez Drive court based its holding on the conclusion that the property did not to any special degree facilitate the concealment of drug activity. In reaching that conclusion, the court rejected as "mere conjecture" the government's argument that "a legitimate leather goods business on the property provided a cloak of legitimacy to the illegal drug traffickers who frequented the house." *Id.* In the instant action, however, the fact that a security guard at the Kenmore Hotel offered to tell police that undercover officers posing as drug buyers were visiting relatives at the Kenmore Hotel removes from the realm of "mere conjecture" the inference that drug buyers were exploiting the appearance of legitimacy inherent in visiting a hotel. The undisputed facts of the instant case demonstrate that, under the claimant's management, the Kenmore Hotel provided a degree of seclusion for drug activity in excess of the seclusion that one could obtain from an ordinary hotel. The physical decay of the hotel itself provided drug traffickers with unlocked, vacant rooms in which to store their drugs, and the defective door buzzer and the location of the security camera monitor facilitated illicit access to the building. The ineffectiveness and corruption of the tenant-guards has already been described.

Conclusion

The government's motion for summary judgment is granted. Submit judgment accordingly.

Dated: New York, New York
June 12, 1995

s/ Milton Pollack
Milton Pollack
Senior United States District Judge

APPENDIX C — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JUNE 13, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 4248 (MP)

UNITED STATES OF AMERICA,

Plaintiff,

- v -

ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY AND APPURTENANCES, thereto known as 143-147 EAST 23RD STREET, NEW YORK, NEW YORK, LISTED AS BLOCK 879, LOT 27, WHICH INCLUDES THE KENMORE HOTEL

Defendant-in-rem.

AMENDED JUDGMENT

Plaintiff, the United States of America, having moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the said Motion having come before the Honorable Milton Pollack, Senior United States District Judge, and the Court thereafter on June 12, 1995, having duly rendered its decision, it hereby is

ORDERED, ADJUDGED, AND DECREED, that the plaintiff United States of America's motion for summary judgment is granted, claimant Jude Hotel Corporation's claim is dismissed, and claimant . . .